

1505822 (Refugee) [2016] AATA 4374 (30 August 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1505822
COUNTRY OF REFERENCE:	India
MEMBERS:	Sophia Panagiotidis (Presiding) Judith Troeth
DATE:	30 August 2016
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 30 August 2016 at 11:05am

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Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of India, applied for the visa [in] August 2014 and the delegate refused to grant the visa [in] April 2015.
3. The applicant appeared before the Tribunal on 25 July 2016 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
4. **Background and claims**
5. The applicant first arrived in Australia [in] April 2008 as a secondary visa holder of a [temporary] visa. His wife was [name]. [In] January 2010 the visa was cancelled but the cancellation was revoked [in] February 2010. The applicant was granted a subclass [1] visa as a secondary visa holder and he was granted a further [subclass 1] visa [in] September 2011 as a secondary visa holder.
6. [In] September 2012 the applicant lodged an application for [a student] visa which was refused [in] October 2012. He sought review and the former Migration Review Tribunal (MRT) affirmed the decision to refuse the visa on 16 October 2013. The applicant requested Ministerial Intervention [in] November 2013 however this was declined and the applicant was sent a letter regarding this outcome [in] July 2014.
7. [In] August 2014 the applicant lodged an application for a protection visa and he was interviewed in relation to his claims [in] March 2015.
8. The applicant's claims can be summarised as follows:
 - The applicant arrived in Australia with his wife [name] in April 2008.
 - In November 2010 she was diagnosed with [a] disease which was a sudden shock to the applicant and his family.
 - His wife's family blamed the applicant for her health condition and they forced her to stay away from the applicant.
 - His wife wrote a letter to the Department [in] September 2012 advising that her relationship with the applicant had broken down.
 - [In] November 2012 the applicant's wife died in India. The applicant was in Australia and travelled to India to join her last rites. He was treated badly by his in-laws when he attended the death ceremonial gathering. He was abused and blamed for his wife's death.
 - The applicant left his in-law's place with his parents "in such a tense atmosphere without any defence".

- The applicant returned to Australia because of the immense tension and the death threats he received from his wife's family.
- In July 2013 the applicant returned to India to visit his parents who usually reside in [another country] but were visiting India at that time.
- [In] September 2013 the applicant's father in law followed him to his home and was accompanied by [other] men. All [were] armed with pistols.
- The applicant greeted his father in law by touching his feet but was pushed away and abused and accused of the applicant having murdered his wife. His father in law slapped the applicant's face while the other two men tried to hold him. The applicant's father who also had a pistol intervened and rushed the applicant into their car.
- The applicant returned to Australia [in] September 2013 to await the outcome of his MRT review. When this was unsuccessful, he requested Ministerial Intervention to allow him to stay in Australia. He preferred to "save his student visa application" instead of lodging an application for a student visa.
- If he returns to India, his in-laws may trap him again to kill him or harm him for their honour and to avenge the death of their daughter.
- The authorities will not protect him as this is a family matter. Even if the police intervene, they cannot guarantee his safety.

9. The hearing

10. The applicant confirmed he was a citizen of India. He confirmed he was born in Punjab and raised there. He also confirmed he is a Sikh. He speaks English, Hindi and Punjabi. He told the Tribunal he completed secondary school he studied [a course]. The applicant confirmed his parents live in [country] and are permanent residents. He has a [sibling] in Punjab and the other is living in [country]. His father works as a [occupation]. The applicant did not work in India as he was still studying and did his training in [course]. He was then married and came to Australia. In Australia he has worked on a farm in [town] for 20 hours per week while his wife studied. He has also worked as a [occupation]. He last worked in 2014 and his family and friends have been supporting him financially as he is not allowed to work. He has not applied for permission to work because his father has told him to focus on his protection visa application and he can repay the monies when this was settled. The applicant has remarried [in] December 2015 and his wife is a permanent resident in Australia and originally from India. The applicant said he has no other family in Australia but his family visited him in April 2016.
11. The Tribunal asked the applicant why he was so confident he would be granted a student visa by the Minister. He told the Tribunal he was confident because his skills are very good and that after finishing all his studies in Australia and acquiring skills he could make his life better. He confirmed he did not appeal the decision made by the MRT further. The applicant was asked why if he feared returning to India that the student visa was the appropriate visa to apply for. The applicant said that he wanted to finish his studies and get good skills and he planned live his life in Australia and stay here and establish his life here because he knew that after getting a student visa and good skills he could establish a good life.
12. The applicant was asked if he knew that the student visa was a temporary visa. The applicant said after he obtained the student visa he could get on with his life and without that he was unable to do anything else.

13. The applicant was asked if he obtained any advice about his visa options if he feared returning to India. He said he did not.
14. The applicant was asked why he did not apply for the protection visa earlier, as he had returned to Australia in September 2013 and did not make his application for a protection visa until [August] 2014 some 11 months later. The applicant said he had not obtained any advice about a protection visa because he was unaware of it. He had spoken with his friends who advised him to make an application for a protection visa. This was just before he lodged the application. He said that had he known he would have lodged the application for the protection visa earlier.
15. The applicant was asked why he did not mention his fear of returning to India in his application to the Minister for intervention for the refusal of his student visa application. The applicant said he did not aware he had to mention this and was just focusing on his student visa. The applicant was asked if there were any reasons he could not return to India. He said he cannot remember if he was asked any questions about that.
16. The applicant was asked when and where he met his first wife. The applicant said they met while they were both studying [course]. They were married in 2008. His wife wanted to do further study in Australia. She was training in [another course]. She did not do any further study because she became ill before she could finish her training.
17. The applicant said that his wife's father did not initially approve of the match but later accepted the relationship. Her father was not happy with a love match for his daughter and they believe more in arranged marriages. Her father would have preferred his only daughter to marry someone of his choosing. The applicant and his wife were both Sikh but they were not of the same caste. She was [name] and the applicant is of the [name] caste. The [wife's caste] is not considered a higher caste but his wife's family is rich and his family is not badly off. His wife's father did agree with the relationship because his wife was very stubborn and she persuaded him and her mother to accept the relationship.
18. The applicant was asked why his in-laws blamed him for his wife's death. She was ill for some time and travelling to India and also returned to Australia for treatment for her [medical condition]. She was treated at [a] Hospital and [another] Hospital which was very good treatment. Her father does not believe the applicant got her appropriate treatment. His father in law believed he wanted to kill his wife. Her father made her agree to return to India for treatment. While she was in India she would worry about the applicant and returned because he was in Australia alone. While she was in India she did receive treatment.
19. The Tribunal asked if the doctors in India who were treating the applicant's wife would have had discussions with her family about her treatment and explained about her condition so why do his wife's family blame him for her death. He said they did and were told she would be better off in Australia with her husband and if she was treated overseas, this was better than getting treatment in Australia. His wife also believed she was getting better treatment in Australia which is why she kept coming back. Her father asked her to stay in India and would look for excuses to keep her there to keep them separated. There was no history of [this] disease in her family. His wife's family believe that he has used black magic and that the applicant and his mother were involved in this and wanted to kill his wife. They are not very literate people and they are old fashioned. The applicant was asked why his wife's family would believe he wanted to kill his wife. He said that it was because she preferred to spend more time with him and did not want them to come and visit. It was also because the person they originally wanted her to marry was still single and her father wanted her to leave her husband and return to India and marry this person. It was for her father's ego. Her father is a farmer and owns a lot of land and he also has political status and was made the [senior official] of the area. He was appointed by the Punjab government as a [senior official] of the

[name] District on the council and has an appointment for [number] years. If a person is rich and has status and helps political parties such as the Shiromani Akali Dal which is part of the governing coalition in Punjab they can be appointed to such positions as a reward for their support.

20. The applicant confirmed his wife died [in] November 2012 and he returned to India for the India for her funeral rites. This involved a ceremony called the Bhog which is held 10 days after her death. He was not told exactly when his wife died. He had spoken to her last on the day she died as it was [a special date]. He was notified by telephone of his wife's death by her mother two or three days after the event. He said his wife used to contact him daily and after [date] November 2012 when she did not contact him he thought her family were putting pressure on her and he tried to ring her but the phone was turned off.
21. The applicant confirmed he returned to Australia in December 2012. He was asked if anything in particular occurred before his return. The applicant said when he attended the Bhog, her father was very angry with him and pushed him. There were many people there and others intervened. His father in law accused him of killing his daughter and he was not going to spare him. He does not remember everything that was said. His mother was also present at the ceremony but not his father. The applicant understood that his father in law was angry and he had never approved of him and his wife's death was an excuse not to spare him. His father in law has political status and money and support and can do anything. He did not understand everything that was going on that day as he was upset at his wife's death but he became scared of his father in law. The applicant was asked what he feared his father in law could do to him. He said he did not know.
22. The applicant was asked about an incident in which he has claimed he was threatened by his wife's family [in] September 2013. The applicant said he and his father were in a car leaving their village. His father in law was in a car with [some] people coming towards the village. They stopped and he got out of the car and greeted his father by touching his feet but he pushed him away and said to the applicant he killed his daughter and was responsible for her death and he would not spare him. He then took out a revolver and the others with him were also angry. In the meantime his father got out of the car and he took out his own revolver. The people who were with his father in law then pushed him into the car as they saw that if his father in law used the revolver then the applicant's father would also shoot. His father in law got out of the car again and was trying to shoot him and pick a fight with him but the others took him away forcibly. The applicant was asked why his father was armed. He said he had taken the revolver for his own protection. His [relative] also has a weapon. The Tribunal asked the applicant if his father and his [relative] used to go around armed with their guns. The applicant said they regularly carried their weapons. He does not know what type of revolver he has. The applicant was asked if his father carries around the revolver if he is in the village. He said not all the time, but if there is some situation he does but not normally however if he has to travel some distance, his father carries his weapon.
23. The applicant was asked if he or his father anticipate there would be any trouble when they were in India in 2013. The applicant said that ever since his father in law became angry with him at his wife's death ceremony, whenever they went anywhere together his father would carry a weapon. The applicant was asked if they knew they would be seeing his father in law on that day. He said they did not know for certain, but he knew they would meet up at some point.
24. The Tribunal asked the applicant if it was a crime for people are armed with revolvers threaten to kill people. The applicant said that the government provides licences for guns which are for protection but many people use the guns for criminal purposes. The applicant agreed that when a person threatens to kill another it is a crime. His father lodged a

complaint at the police station in their district, but because of his father in law's status and money and also because of police corruption no action was taken against him.

25. The applicant was asked if his father in law discharged his firearm when they met [in] September 2013. The applicant said that his father in law did fire some gun shots in the air when he saw the applicant's father took out his gun. He cannot remember how many shots were fired. His own father did not shoot his gun. The applicant was asked if it was common to travel around with a gun and pull these out. The applicant said that people with status and land do carry guns.
26. The applicant said his father returned to India in 2014 and he was harassed by the applicant's father in law a lot. On one occasion his father in law and others pushed his father around and asked him when his son was coming to India and they pushed him onto the ground. His father then went to the police and lodged another complaint. His father has also taken an action in court because the police have taken no action. It is an action in the civil court and he has provided documents about this case. The case is going on and summonses have been issued but his father in law and others named in them have refused to appear. The applicant was asked what they were hoping to achieve with the court case. The applicant said they are trying to sort the matter out. His father wants his son's in-laws to be arrested but they keep on prolonging the court case as they were waiting for the applicant to return to India. He said if they do not appear in court, the court has the capacity to arrest them.
27. The Tribunal expressed concern that the complaint was criminal in nature and the matter has been taken to a civil court and it was unclear as to what was likely to be achieved. The applicant said that his father lives overseas he is not fully aware what can be done and if this court does nothing, he intends to take the matter to a higher court if the current court cannot sort things out because he is concerned about his son's safety. The applicant said he knows very little about what is likely to happen. He said that his father has been to the police twice and nothing has been done and so he therefore has taken this action. His father lodged the complaint with the local police in his district and his father in law lives in another district. He confirmed that the police in their district have refused to take action because his father in law has a lot of money and can do whatever he wants.
28. The applicant was asked how far his village is from his father in law's village. He said that it is about [distance] km away. There is a single road with a lot of traffic. The applicant said he has not been there since 2013 he was unsure if his father in law's village is [distance] km away, or about from 45 mins to two hours depending on traffic.
29. The applicant was asked to confirm if his father in law lived in a different district and why his own district police would refuse to act. He said Punjab is a small state and powerful people can do what they want.
30. The Tribunal referred to the Department of Foreign Affairs and Trade's (DFAT) Country Information Report on India dated 15 July 2015 in relation to the police:
 31. In general, police in India have broad powers of arrest, including arrest without warrant where they have a 'reasonable suspicion' of a connection to criminal offences. To report a crime, citizens may first lodge a First Information Report (FIR) at a police station. The Supreme Court has recognised the difficulty faced by some victims of crime in having an FIR registered and has directed that the registration of FIRs should be mandatory for cognisable offences – those serious crimes for which police do not require a warrant to arrest a suspect.
32. The Tribunal referred to this country information which indicates that the Supreme Court has made it mandatory for the police to accept an FIR, so the applicant was asked if the police did not do so. The applicant said that he understands that is what is supposed to happen but

in Punjab there is a problem that the government appoints people to the police directly without looking at their qualifications or experience and there is corruption. Therefore if an ordinary person complains to the police about a person with influence they do not take any action.

33. The applicant was asked about the status of his relationship with his wife and referred to information provided by her to the Department in September 2012 before she returned to India that she and the applicant had separated September 2011. The applicant was asked to clarify this and his responses to the Department. He knows that his wife gave a statement to the Department. His wife fell ill in 2010 and in 2011 her parents came to Australia. They pressured her and persuaded her that her husband was not getting her any treatment and they told her to return to India for treatment. His wife was very fond of her father, so when they put pressure on her to go to India for treatment she did. However she returned to Australia for treatment too. Their visa was going to expire in 2012 and her father had pressured her to come back before that happens and get treatment and to also give a statement to the Department that they had separated the year before because she needed to show a year's separation in order to get a divorce. However this was not the case. Whenever she returned to Australia he would pick her up from the airport and they would attend her treatment together.
34. The Tribunal asked the applicant to clarify his answer as his explanation was not clear. The Tribunal asked the applicant if his father in law wanted his daughter to apply for another [visa]. The applicant said that his wife wanted to stay in Australia and apply for an extension of her visa, however her father did not want her to do this. He told her to come back to Australia and to lie to the Department so that she can get a divorce and for her to marry to somebody else because her husband was not going to get her the treatment she needed.
35. The Tribunal asked the applicant why his wife told the Department that they had separated in September 2011. She notified the Department in September 2012 that they had not been living together as husband and wife. The applicant said that he went with his wife to the Department and she told him she was going to tell them they separated because her father had told her to. She also told him to stay in Australia and finish his studies and after she has her treatment in India she will come back to Australia. She told him that because she loves her father she will do as he said.
36. The Tribunal asked for clarification as to the reason why the applicant's wife was going to notify the Department they had separated. The applicant said that she did this because her father wanted her to do it and she asked him to come with her as she did not want to go by herself. She told him to tell the Department he wanted to stay in Australia and her father was making her do this. The applicant said that someone had told his wife's father that if she told them they had separated she would be able to get a divorce sooner.
37. The Tribunal indicated the Department does not have the power to give her a divorce. The applicant said he knew that but his wife's father had heard that is what she needed to do.
38. The Tribunal asked the applicant about statement he had made that his wife's notification about their separation to the Department was to support him and not to create an adverse effect and she wrote the letter with the intention of allowing the applicant to stay in Australia. The applicant said that he and his wife had discussed this and she had told him he should stay in Australia and finish his study and she would return to Australia after her treatment. He said that his wife knew what her father was like and reiterated that she told him he should remain in Australia and finish his study and that if he returned to India her father would kill him.

39. The Tribunal indicated that this explanation was different to the way it appears in the Department's documents. The applicant was asked when he became aware that his wife was going to notify the Department that they had separated. The applicant said he did not know exactly when but it was before they went to the Department. She told him she had to go to the Department because her father had asked her to do it. She did not want to do it and was very upset but her father had pressured her to do it. He had told her she did not have to do this if she did not want to but she insisted because her father wanted her to do it and she had to do it and she was trying to protect the applicant. He said his wife was very confused and even he was confused.
40. The Tribunal put to the applicant adverse information under s.424AA of the Act and advised that this information would subject to the applicant's comments, be the reason or part of the reason for affirming the decision under review. The Tribunal was concerned with information contained in letters to the Department by the applicant and the contents of those appears to contradict the evidence he had given to the Tribunal at the hearing and this raises concerns about the credibility of his evidence to the Tribunal. The Tribunal also indicated he could choose to respond at the hearing and he could also provide a further response after the hearing if he wished.
41. The first evidence of concern was contained in a letter dated [in] October 2012 to the Department where the applicant stated that he and his wife attended the Department and at that stage the decision to separate was never made or discussed until [date] September 2012, the day they went to the Department and this was when she wanted to end the relationship for health reasons and wanted to return to India for good. He also states in that letter that he was never made aware or given reasons that they were separated as they were in constant contact while his wife was in India and on each of her returns they stayed together. He also stated this was when his wife wanted to end the relationship and go back to India for good.
42. The Tribunal said this indicates that the applicant and his wife had not discussed their separation until the day they attended the Department when she notified them that they had separated. This was different to the evidence he had provided during the hearing.
43. The applicant said that his wife told him they had to go to the Department and give information to them and when they got there they were taken away separately and asked questions.
44. The Tribunal asked the applicant to clarify if he knew that his wife was intending to notify the Department of the separation on the day they attended.
45. The applicant said he and his wife had discussed going to the Department but had not discussed the details only that she was going to tell them they had separated and she was doing this because that is what her father wanted her to do.
46. The next adverse information was a letter dated [in] November 2013 which formed part of the applicant's Ministerial request for intervention in which he states that the reasons why his wife told the Department they were separated was to support his student visa application and she did this in order to allow him to stay in Australia and after she had some advice from a migration agent.
47. The applicant said he did not remember if she got advice from a migration agent. They had discussed his staying in Australia as a student and she would return after her treatment and they could resume their relationship because if she stayed in India, her father would definitely have her marry someone else. In the application for Ministerial Intervention he

wanted to write about his personal discussions with his wife but was in an emotional state and he may have made some mistakes.

48. The next adverse information was contained in a file note dated [in] September 2012 which appears to be a record of discussion between the applicant and a Departmental officer. This record appears to have been made after the applicant's wife had been interviewed and given a statement about their separation. The applicant was asked how long they had been separated and he replied not long and he also stated that he had not heard from his wife since late "last year" which was around October 2011 until she returned in August 2012. The record also shows that the applicant had advised he had not spoken to his wife because he could not get in touch with her and he did not know what was going on with his relationship status.
49. The applicant said at that time while his wife was in India, her father would not allow her to talk to him on the phone and when she was with him she would just listen to what she was saying and because of her illness she was confused as to who she should listen to, her father and her husband.
50. The applicant was asked to clarify if he and his wife were still in a relationship for that period of time. He said they were in a relationship but he did not know the status of the relationship because sometimes she was with him and sometimes she was not.
51. The Tribunal put to the applicant his wife's advice to the Department that he did not want to continue their relationship because of her [medical] condition.
52. The applicant said that his wife had said this because her father had put pressure on her and she did what he had told her. The advice she gave the Department that they had not been together was not correct.
53. The Tribunal outlined a further concern that in his protection visa application he has claimed to fear harm from his father in law but the letter he wrote in [November 2013] as part of his application for a Ministerial Intervention he had stated that his relationship with his parents in law was fine and that he went to India to see his mother in law because she was sick which indicates he was still in a relationship with his wife's family despite her death.
54. The applicant confirmed that he said this to the Department while he was on a bridging visa in 2013 when he was asked why he wanted to travel to India. He said his parents had informed him that his mother in law was unwell and wanted him to go to India. They thought that after the events of 2012 and the altercation with his father in law things may or may not have improved. However if his in laws informed him of his mother in law's illness and if they spoke to him well then he should go to see them. If not he should just remain in India for two months and then return to Australia. The applicant said at that time he was feeling emotional and wrote to the Department about his positive relationship with his in-laws. However, while he was in India and due to return to Australia [in] September 2013 and [earlier in] September 2013, his father in law he attacked him. While all these things were going on he had to put in his letter for his request for Ministerial Intervention and he thought that his father in law would cool down after a year or so. At the time he requested Ministerial Intervention, his circumstances were not that intense and so that is why he did not say anything about the events that had occurred while he was in India.
55. The Tribunal asked the applicant why he obtained the medical certificate regarding his mother in law's illness and why did he provide it to the Department as he had not actually seen her. The applicant said the doctor was a friend of his father and his father obtained it. He got his father to get it because he might need it because he had travelled to India

because of his mother in law's health. The Tribunal asked the applicant why he mentioned his relationship with his parents in law at all and why he provided the medical certificate.

56. The applicant said that when he wrote the letter he was emotional and did not know that these matters would be so prolonged. He did not know much about visas or about protection visas. No one helped him with this letter other than a friend who has returned to India.
57. The applicant told the Tribunal that the situation with his father in law has deteriorated and he cannot return to his village, town or state in India because he will be killed. His father in law would come to know if he returns because Punjab is a small state and he travels for political purposes and rallies. There is someone in his village who informs his father in law about him and his family.
58. The applicant was asked what would stop him from relocating elsewhere. He said his father in law would come to know because the Punjab government is with him.
59. The Tribunal referred to India's large population and many large cities. According to the country report on India by DFAT, there is a lot of mobility within India and there are about two hundred million internal migrants who had settled permanently elsewhere and it would be very difficult to find someone in India and millions of people in India relocate either temporarily or permanently to find work. There are also a range of viable internal relocation options for individuals seeking protection from discrimination or violence.
60. The applicant said if he lives in Punjab his father in law will find out within one month and if he lives elsewhere it will take him another month because he has a lot of links everywhere throughout India. The applicant said that he and his wife have relatives living around India. He would be unable to hide as someone would be bound to see him at some point. Because his father in law did not initially want him to marry his daughter there was a lot of involvement by many people on both sides of the family who helped to make it happen. He would not be safe. Even if he only communicated with relatives from his parent's side, they may be in touch with relatives from his wife's family. They would tell his wife's relatives about his being in India because they would want to maintain their relationship with his father in law because of their status. That is why his father in law would eventually find him.
61. The applicant's current wife is also from [City 1], Punjab but they were married in Australia and he is not in touch with her family. Her parents and her [sibling] in [another country] are aware of their marriage but none of the relatives in India are aware.
62. The applicant was asked if he was aware of the treaty in Nepal that allows Indian citizens to enter and to possibly reside there. He was asked if there was any reason why he could not live in Nepal if he was unable to live in India in order to wait for his wife to make an application for a partner visa.
63. The applicant said his wife would not agree to live with him in Nepal. She has applied for a position [with a university in Australia].

CONSIDERATION OF CLAIMS AND EVIDENCE

64. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.

65. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
66. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
- owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
67. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
68. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.
69. The issue in this case is whether Australia has protection obligations in respect of the applicant for reasons of his race, relation, political opinion or membership of a particular social group, or whether he faces a real risk of significant harm for any reason.

70. *Credibility*

71. The mere fact that a person claims to fear persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is 'well-founded' or that it is for the reasons claimed. Similarly, that an applicant claims to face a real risk of significant harm does not establish that such a risk exists or that the harm amounts to 'significant harm'. It remains for the applicant to satisfy the Tribunal that all the statutory elements are made out. Although the concept of the onus of proof is not appropriate to administrative inquiries and decision making, the relevant facts of the individual case will have to be supplied by the applicant herself or himself.
72. The Tribunal accepts the difficulties of proof faced by applicants for refugee status and complementary protection. In particular, there may be statements that are not susceptible of proof. It is rarely appropriate to speak in terms of onus of proof in relation to administrative decision making: see *Nagalingam v MILGEA & Anor* (1992) 38 FCR 191 and *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 357; 6 ALD 6 at 10. The United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992, at paragraph 196-197 and 203-204 recognises the particular problems of proof faced by an applicant for refugee status and states that

applicants who are otherwise credible and plausible should, unless there are good reasons otherwise, be given the benefit of the doubt. Given the particular problems of proof faced by applicants a liberal attitude on the part of the decision maker is called for in assessing refugee status and complementary protection obligations.

73. However, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. Moreover, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. In addition, the Tribunal is not obliged to accept claims that are inconsistent with the independent evidence regarding the situation in an applicant's country of nationality. See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 457.

74. Country of Reference

75. The applicant claims to be an Indian national. Based on identity documents provided to the Department, the Tribunal finds that India is his country of nationality and also his receiving country.

76. Assessment of claims

77. The applicant confirmed that the main reason he has claimed protection is that he cannot return to India because he fears harm from his former parents in law and that police and authorities will be unable to protect him.
78. The applicant has provided an affidavit by his father who essentially confirms that his son has been threatened by his father in law in order to avenge the death of his daughter. The applicant has also provided a copy of a complaint made to a court [in] July 2017 in the name of the applicant's father. This indicates that a complaint has been issued to the applicant's former parents in law and [relative] and refers to an attack and threats made to the applicant by the "accused" in 2013 and that the police took no action. The complaint also refers to an attack on the applicant's father [in] June 2015 by the accused and that the attack was reported to the police but [in] July 2015 the police "flatly refused to take action against the accused, as the accused persons are high handed persons."
79. The Tribunal notes that in relation to the applicant's visa history, the applicant first arrived in Australia as a secondary visa holder of a [temporary] visa. This visa was cancelled [in] January 2010 but the cancellation was revoked [in] February 2010. The applicant was granted a subclass [1] visa as a secondary visa holder and was granted a further subclass [1] visa [in] September 2011 again as a secondary visa holder.
80. Records show that [in] September 2012 the applicant lodged an application in his own right for a [student visa] which was refused [in] October 2012. He sought review of that decision and the Migration Review Tribunal (MRT) affirmed the decision to refuse the visa on 16 October 2013. The applicant sought Ministerial Intervention [in] November 2013 however this was declined. He was advised of this outcome [in] July 2014.
81. The applicant lodged an application for a protection visa [in] August 2014 and was interviewed in relation to his claims [in] March 2015. According to the delegate, during the interview the applicant provided the following information:
- He had a good relationship with his wife until her parents started to pressure her into divorcing him.

- He did not accompany his wife on any of her trips to India between October 2011 and September 2012 because her parents told her not to bring the applicant with her.
- His father in law is a powerful person because he knows many parliamentary ministers and has supported them.
- He did not apply for a protection visa earlier because he was confident that he would be granted a student visa by the Minister.
- He prefers to remain in Australia because of his skills. If he cannot be granted a protection visa, he would like a student visa to be granted to him as he has skills and is able to contribute to Australia because of his skills.

82. The Tribunal had a number of concerns about the applicant's claims which included information the applicant had provided to the Department which were at odds with his claimed fear harm if he were to return to India.
83. The Tribunal had concerns about the information the applicant provided to the Department in his request for Ministerial Intervention and also the reasons why he did not mention his claimed fear of harm when interviewed by the Department's compliance and status resolution officer each time he applied for a bridging visa. The Tribunal also had concerns about the applicant's relationship with his late wife.
84. The applicant was asked why he told the Department that he was confident that the Minister would intervene on his behalf and grant him a student visa as he would prefer to remain in Australia on the basis of his skills. The Tribunal notes the delegate did not accept this explanation that he preferred the option of a temporary student visa rather than seeking permanent protection. The applicant's answers to the Tribunal's question on this point were vague. He told the Tribunal that he had good skills and after finishing his studies in Australia and acquiring skills he could make his life better. The applicant was also asked why if he feared returning to India that a student visa was the appropriate visa to apply for. The applicant replied that he wanted to finish his studies and get good skills and he planned to live his life in Australia and stay here and establish his life here because after getting a student visa and good skills he could establish a good life here. The applicant was asked if he was aware that a student visa was a temporary visa. The applicant replied that if he was granted a student visa he could get on with his life and without that he could be unable to do anything else. The applicant told the Tribunal that he had not received independent advice about his visa options.
85. The Tribunal found this evidence concerning as it did not explain why he was so confident about being granted a student visa by the Minister after the Department and the MRT both refused the application. The applicant's evidence to the Tribunal was that he completed secondary school and studied [course] in India before coming to Australia with his wife. The applicant was unable to explain why he believed his skills were such that he would be granted a student visa by the Minister. The applicant also confirmed he did not appeal the decision made by the MRT.
86. In relation to the temporary nature of a student visa the applicant was unable to provide a satisfactory explanation as to why he thought he would be able to remain in Australia permanently if this was granted. His response was essentially that he would be able to establish a good life, would be able to get on with his life and without he would be unable to do anything else.
87. The Tribunal was also concerned as to why the applicant did not mention his fear of harm if he returned to India when he requested Ministerial Intervention and during interviews with

the Department for ongoing bridging visas. The applicant's evidence was that he was not aware of protection visas and mainly focused on his application for a student visa. He also told the Tribunal that he does not remember if he was asked if there were any reasons why he could not return to India during the interviews for the bridging visas.

88. The Tribunal notes that the applicant requested Ministerial Intervention in November 2013 and he lodged a claim for a protection visa in August 2014 at which time he raised his fear of returning to India for the first time. The Tribunal also notes that in his application for a Ministerial Intervention he indicated he and his wife were living together as husband and wife and had not separated and he had travelled to India to see his ailing mother in law in July 2013 in order to emphasise his relationship with his wife's family was cordial. The Tribunal infers this was in response to the notification made by his wife in September 2012 that they had separated in September 2011.
89. The applicant was asked about the notification and why it was made since he has contended that he and his wife had never separated. He told the Tribunal that his wife's parents blamed him for her illness and subsequent death and considered he had not done enough in relation to obtaining appropriate treatment for her in Australia. He told the Tribunal that his wife's father put a lot of pressure on her to separate from him. When she returned from India in 2012 she told him she had to go to the Department and tell them they were separated because that is what her father wanted her to do. He said he accompanied her to the Department and knows she gave a statement as did he about their relationship. The applicant said that his wife and her father believed that by informing the Department they had been separated for a year she would be able to obtain a divorce sooner.
90. The Tribunal notes that the applicant's wife attended the Department [in] September 2012 to notify of her separation from the applicant. The record of this attendance also notes the applicant was present and he was asked to make a statement in relation to his relationship status. He told the Department that he and his wife had not been separated for long. The applicant's wife stated they had been separated since September 2011. The Tribunal notes that the applicant made his own application for a student visa [in] September 2012 which was after this attendance.
91. The applicant told the Tribunal that he and his wife had discussed her going to the Department and telling them about the separation and she was going to do this for him so that he could remain in Australia and finish his study. The Tribunal notes however that in a letter to the Department dated [in] October 2012 the applicant states when they attended they had not discussed her intention to end the relationship for health reasons. In a letter to the Department dated [in] November 2013 he also wrote that the reason they were separated was that she wanted to support his student visa application so he could stay in Australia.
92. The Tribunal found the applicant's responses in relation to the status of his relationship with his wife and the reasons for her notification that they were separated in September 2011 to be unclear and contradictory.
93. Overall the Tribunal was not convinced that the applicant and his wife were in a continuing relationship in September 2012 when she notified of the separation and accepts her notification that they had separated in 2011. The Tribunal considers that the applicant made his application for the student visa after the notification as he wanted to remain in Australia and he could not do so on his wife's student visa.
94. The Tribunal also considers that the applicant has provided false information to the Department about the reason he travelled back to India in July 2013 in that the purpose of his visit was to visit his ailing mother in law.

95. The applicant confirmed during the hearing that he did not see his mother in law while he was in India and obtained a medical certificate in relation to her medical condition from a friend of his father who worked at the hospital but could not explain to the Tribunal why he felt the need to do so.
96. The applicant's responses in relation to the delay in applying for a protection visa were also not convincing. The Tribunal did not accept his explanation in relation to preferring a student visa and considered his responses that this would enable him to establish a good life to be disingenuous and evasive. The Tribunal does not accept that the applicant was not aware of protection visas prior to 2014. The applicant said he found out about protection visas through friends after his Ministerial Intervention request was refused. The Tribunal notes the applicant has been living and working in Australia since 2008 and has had numerous interactions with the Department since then. He would also have been aware at the time that his late wife notified the Department in September 2012 of their separation that he would need to consider his visa options and he subsequently lodged an application for a student visa [in] September 2012. The Tribunal considers his evidence as to the reasons he did not declare his fear of return to India earlier with his request for Ministerial Intervention in November 2013, particularly after his recent claimed encounter with his father in law or during any of the interviews with the Department about his bridging visa applications to be unconvincing and not credible.
97. The Tribunal also considered the applicant's claims in relation to the events in September 2013 when he returned to India and was confronted by his former father in law who was armed and that shots were fired. His evidence is that his father was also armed in that encounter.
98. The Tribunal put to the applicant that it found it difficult to accept that his father in law could fire a gun at him and his father and the police would not take any action and also that this was the first time the fact that the weapons had been fired was mentioned. The applicant agreed with the Tribunal that trying to kill a person is a crime in India but that the police refused to act as his father in law was a powerful and well-connected person.
99. The evidence in relation to this incident has been an affidavit by the applicant's father and a copy of a complaint made by his father to the court in relation to the alleged incident in 2013 and a further incident in 2014 when his father was harassed a lot by his father in law and was pushed to the ground and asked about the applicant. The applicant has not provided any copies of the complaints he had claimed were made to the police. According to the complaint made to the court, the first claimed attack was reported to the police as was the second attack. According to country information common practice by the police in India is to issue an FIR. The Tribunal discussed the issue of FIRs and the order made by the Supreme Court in India with the applicant that the registration of these are mandatory for crimes for which the police do not require a warrant to arrest a suspect. The applicant's response is that his father in law is too well connected for the police to take action against him. The Tribunal does not find it plausible that police in India would not at least enquire into a complaint where a person who has attempted to shoot a person in front of witnesses no matter how well-connected they are, or indeed when a person is assaulted in front of witnesses in a public place and the perpetrator can be identified. In light of the Tribunal's concerns with the applicant's credibility it does not accept the applicant's claims in relation to the attack and threats by his father in law. The complaint to the court appears to be a statement made by the applicant's father and there has been no testing of the evidence by a court or anyone else in relation to that complaint and the Tribunal gives this little weight.
100. The Tribunal does not accept the applicant's evidence that his parent's in law blamed the applicant for their daughter's death and believed he was trying to kill her or that he and his mother had used black magic to do so. The Tribunal notes that her family allowed her to

return to Australia on a number of occasions where she received treatment. The Tribunal considers that if they had believed the applicant was intending to harm her in any way they would not have allowed her to return.

101. The Tribunal considers that the evidence indicates that the applicant and his wife did separate sometime in 2011 but accepts she returned to Australia for treatment and in the period she did so she remained with the applicant. The evidence as to an ongoing genuine and continuing relationship is limited to the applicant's evidence which is directly contrary to his late wife's statement to the Department in September 2012.
102. The Tribunal accepts the applicant's evidence that his parents in law, particularly his father in law was not keen on the marriage to his late wife but reluctantly accepted it. The Tribunal considers that as a result of the separation between the applicant and his late wife, the relations with his former in laws became strained. The applicant's late wife notified the Department in September 2012 that her husband he did not want to continue their relationship because of her [medical] condition. The Tribunal concludes on the basis of this evidence that the reason for his father in laws anger at the funeral rites are more to do with the applicant wanted to separate from his daughter because of her health and not because her father had pressured her into doing so.
103. The Tribunal also notes the evidence that when the applicant returned to India in 2013 purportedly to see his ailing mother in law, he did not do so but later declared he did and then later in 2014 claimed to have been threatened with serious harm by his father in law.
104. The Tribunal does not accept that the applicant's former parents in law have any interest in harming him on his return to India now or in the foreseeable future and therefore does not face a real chance of harm on his return.
105. In assessing the applicant's claims individually and cumulatively, the Tribunal does not accept that there is a real chance of serious harm if he returned to India. The Tribunal is not satisfied the applicant has a well-founded fear of persecution now or in the reasonably foreseeable future if he returns to India.
106. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(a).
107. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
108. The Tribunal has found the applicant to have given inconsistent evidence in a number of matters which raised concerns about his credibility. These concerns included his relationship with his late wife, his relationship with her parents and the reasons for the claimed threats to his life by his former parents in law. The applicant's evidence about the timing of events was unclear and unpersuasive. The Tribunal found the applicant's evidence about his relationship with his late wife to be contrary to the statement she made to the Department about the status of their relationship. The Tribunal also did not accept that the applicant was threatened by his father in law in the way he has claimed. For these reasons, the Tribunal is not satisfied, on the evidence before it, that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to India there is a real risk the applicant will suffer significant harm, in the form of: arbitrary deprivation of life; the death penalty being carried out; torture; cruel or inhuman treatment or punishment, or degrading treatment or punishment. Therefore the applicant does not meet the requirements of s.36(2)(aa).

109. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

110. The Tribunal affirms the decision not to grant the applicant a Protection visa.

Sophia Panagiotidis
Member

Judith Troeth
Member